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Rethinking Mediation Assumptions

By mediating early, parties can avoid a lot of the heartburn, not to mention the expense, of disruptive litigation

We are all prone to ruts, particularly the pattern of repeating the same practice when it seems to work. In common parlance, the mantra is "if it ain't broke, don't fix it." But there is another perspective, one that should prompt a serious rethink of the "ain't broke" philosophy.

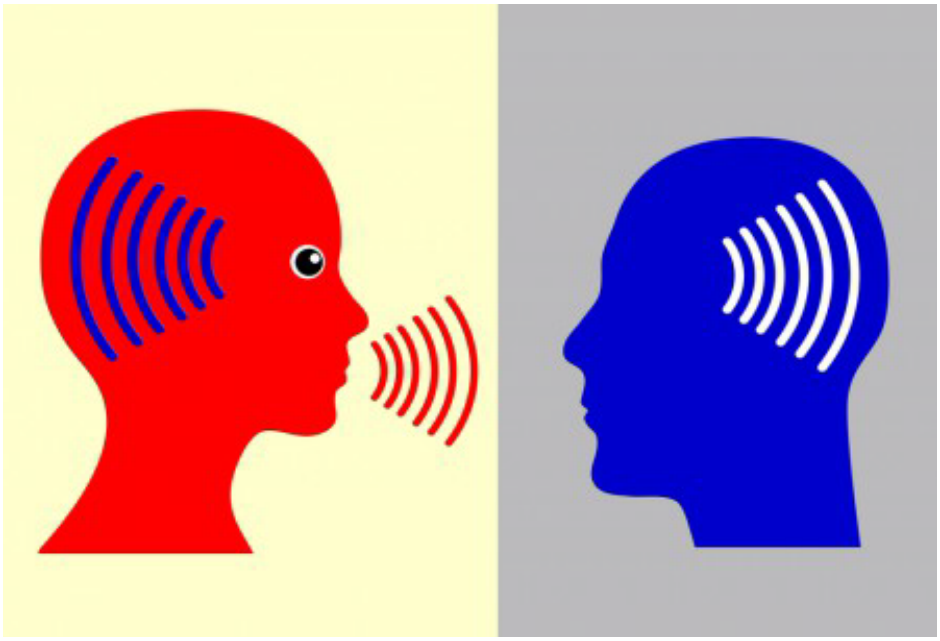
The nagging itch prompting reassessment is the realization that something that is merely good enough is, well, merely good enough.

What if we could do much better?

A Fresh Perspective

When it comes to the mediation of civil disputes, there are plenty of established notions that deserve another critical look. They involve questions about when to mediate; who to talk to; and what words to use in the discussion. Stepping back to reassess the dispute resolution process is a healthy exercise. When done properly, it will only enhance the work done to resolve conflict.

The suggestion here is to rethink the mediation process, starting with how we got here and why we do what we do. In turn, this article posits a different course—mediating sooner and perhaps more than once, using joint sessions thoughtfully, and treating the mediation as a conversation rather than conflagration.



Let's first consider the ruts and assumptions that guide many of us through most civil (i.e., non-family law) mediations, and are worth a fresh look:

- ***Let's Wait:*** *This assumption is based on the premise that mediation is a "one and done" event; you only get one real shot, so hold off mediating until after all the pre-trial work is done;*
- ***No Joint Session:*** *Joint sessions are useless or worse; let me tell you about the time that SOB yelled at my client…*
- ***It's Just Like Court:*** *Effective mediation advocacy is the same as arguing in court.*

Before challenging these notions, let's examine their lineage.

Litigation Model

As described in the first article in this series, modern private civil mediation practice has largely evolved from the traditional litigation model of late-stage mandatory settlement conferences (MSCs) in civil cases (see http://www.callawyer.com/2016/05/overcoming-mediation-anxiety/#). Except for a few brave souls venturing into this field straight from private practice or other non-judicial backgrounds, much of the early growth in private mediation

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was spearheaded by retired judges. Former judges, as well as the counsel appearing before them, were accustomed to settlement sessions held close to trial when most pre-trial work was done. So maybe for better but probably for worse, private mediation sessions quickly mimicked marathon MSC sessions, held late and typically only once in the life of most litigated matters.

Besides its judicial MSC heritage, the rationale for mediating close to trial—after most trial preparation is done—remains the notion that a mediation won't be productive without all that work first being completed. It may be the Boy Scouts' fault (all that *"Be prepared"* stuff) or the impact of too many stories where the proverbial smoking gun is found only after turning over every stone imaginable.

Time to revisit both notions.

Intelligent Planning

First, most cases can in fact be reasonably handicapped for settlement purposes without the time, disruption and expense of full-blown discovery and pleading practice. With some disciplined fact-gathering *as well as* active conversations with the adversary counsel, most facts can be ascertained with confidence and most relevant testimony predicted.

Second, even without a substantive dialogue between opponents beforehand, early mediations can be the vehicle to begin sorting out gaps and misunderstandings as to key facts and the parties' objectives. You might need to call a break, do some additional homework, and come back later. If that happens, so, what? It doesn't make the first mediation session a failure; rather, that first encounter simply becomes the bridge to the informed settlement discussion that ensues.

Here, the "one and done mindset" appears to be tied to the notion that the only productive mediation session is one that resolves the entire dispute. But many civil disputes are more complicated, and require more work, analysis and critical dialogue. Starting the resolution process early typically produces significant net savings in terms of time, disruption and expense.

Object Lesson

Here too, we can all learn from family law mediators. They treat their mediations as a process as opposed to a single event. It all begins with a preliminary conversation that involves no expectation of solving everything immediately. Instead, a dialogue begins as the parties work to sort out their respective interests and objectives, as well as areas of agreement and disagreement, followed by an intelligent plan for further discussions. There are no marathon sessions typically at this early stage, and it usually works well as the parties get deeper into their discussions. Think of this as a swimming pool. Test the water for depth and temperature before you dive in. We can benefit from borrowing these ideas in the civil context.

Who Should Be in the Room

One of the assumptions that most needs another look is the trend away from joint mediation sessions. Ask any experienced litigator. They all have one or more story to tell about a joint session gone awry: lawyers behaving badly; clients becoming irate and entrenched; mediators losing control of the room. Lost in these anecdotes is the fact that a joint session—if properly conducted—can serve as the vehicle to increase the parties' understanding, challenge their misconceptions, and demonstrate that your side (or theirs) may indeed play well before the judge, jury or arbitrator if the case does not settle.

Joint sessions are also an opportunity for a plaintiff to show the other side in an unfiltered dialogue that their claim is different and worth more than other similar claims. Defendants and carriers can in turn talk directly to clients on the other side as to why they see things differently.

So, what impedes a productive joint session? Discomfort with a potentially volatile dialogue, coupled with fear of bad behavior leads many attorneys to avoid having everyone in the same room at the same time. But didn't we pick litigation as a career because we thought we were effective advocates? If so, can't those advocacy skills be channeled into a direct dialogue with the other side? Indeed, if direct advocacy with the other side is effective, isn't your client miles ahead? And remember: just because you advocate and argue doesn't mean you have to be uncivil. In fact, effective advocacy at its best involves just the opposite, finding ways to engage the other side and get them to see your point of view.

All of which brings us to the ultimate realization: if there is no agreement, there is no settlement.

Conversation, Not Conflagration

Keep in mind two things: Cases only settle if everyone agrees, and the mediator can compel nothing.

Behavioral studies prove that we all listen selectively, view our prospects too optimistically, and regularly discount contrary information, particularly in an adversarial setting. (See *http://www.callawyer.com/2016/07/negotiating-in-mediation-why-did-we-stop-talking/*) Given these realities, what is most likely to increase understanding and the prospects of a deal? Is it traditional litigation advocacy or real dialogue? The key here is to avoid conflagration, both in the joint session and the mediation briefs that precede it. You don't build a settlement by exploding dynamite. You do it by talking to the other side.

Think about the likely impact on an adversary of a brief, let alone an oral presentation, laced with invective and ascribing ill intent. Words like "specious," "frivolous," and "baseless," along with accusations of deception and bad faith, only impede the other side's comprehension. Worse, they prompt the other side to respond in kind: "Look who's calling the kettle black?" We all know how well that works.

A better approach is to practice conversation and curiosity. Invite conversation by explaining your position—in both the brief and joint session—in the most factually-based, adjective-free manner. Then ask, what's wrong with this picture? Combine an invective-free presentation and genuine curiosity as to what the other side sees differently. Doing so will most likely to prompt a dialogue about compromise as well as reset expectations as needed.

Obviously, your mediator also plays a key role to in this process. But guess what? Mediators are not impressed with the invective-laced brief or presentation containing overstatements. If anything, those excesses raise credibility questions with most mediators. *If you exaggerate here, should I believe you there?*

The year 2016 will likely be remembered as the year to take nothing for granted. When thinking about mediation, make sure you engage in a rigorous discussion of why we do what we do. Question assumptions. Question the status quo. But do it politely. You will get much further if you do.